89-29 (1)

Supreme Court, U.S.
FILED
JUL 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

NUMBER

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

TONY LEWIS,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

OCTOBER TERM 1988

ON WRIT OF CERTIORARI TO THE
HONORABLE SUPREME COURT OF THE
STATE OF LOUISIANA

ORIGINAL APPLICATION FOR CERTIORARI ON BEHALF OF PETITIONER TONY LEWIS

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I. QUESTIONS PRESENTED

A. Whether the courts below denied the petitioner's federally protected right to privacy secured by the Fourth Amendment by upholding a warrant for the search of his home that was not based upon probable cause where there was clear evidence of bad faith on the part of the officers executing the warrant.

B. Whether the courts below denied the defendant's right to privacy and to due process of law secured by the Fourth and Fourteenth Amendments by upholding a warrant for the search of his home that was based upon an affidavit containing clearly stale information that would have been insufficient to support the warrant had it not been stale.

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IN THE SUPREME COURT
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NO.

TONY LEWIS,

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VERSUS

STATE OF LOUISIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE SUPREME COURT OF THE STATE OF LOUISIANA

The petition of Tony Lewis respectfully requests that a Writ of Certiorari issue herein to review the Judgment and order of the Supreme Court of the State of Louisiana rendered in these proceedings on April 7, 1989, finally denying review of the September 21, 1988 decision of the Louisiana Court of Appeal for the Second Circuit, which

affirmed Petitioner's criminal conviction and sentence to pay a fine and to serve six years in prison at hard labor without benefit of probation, parole or suspension of sentence.

IV. Opinion Below

The only opinion rendered in this case by a Louisiana Court is the opinion of the Second Circuit Court of Appeal which is reported and cited herein as State v. Lewis, 535 So.2d 943 (La. 2nd Cir. 1988). An order denying certiorari was issued by the Louisiana Supreme Court on March 3, 1989. And, on April 7, 1989, that court also issued an order denying reconsideration. The opinion and orders noted above are attached as Appendices A, B and C, respectively.

V. Statement of Jurisdiction

The petitioner's conviction of possession of firearms by a convicted

felon was affirmed by the Second Circuit Court of Appeal on September 21, 1988 in an opinion reported as State v. Lewis, 535 So.2d 943 (La. App. 2nd Cir. 1988). A petition for a writ of certiorari was timely filed in the Louisiana Supreme Court, which petition was denied on March 3, 1989. Thereafter, a petition for rehearing was filed in the Louisiana Supreme Court. An order denying reconsideration was entered by the Louisiana Supreme Court on April 7, 1989. Finally, on application by the petitioner, this court entered an order on May 9, 1989 extending the time for filing this petition to July 6, 1989.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Sec. 2101(d), 28 U.S.C. Sec. 1257(3), and Rule 17.1(c) of the Rules of this court. The petitioner has

maintained since the filing of his motion to suppress evidence, and at the hearing thereon, that there was no probable cause for the issuance of the warrants; that there was clear evidence of bad faith, and that the information contained in the affidavit in support of the original warrant was unconstitutionally stale, all in violation of his federally protected rights, secured by the Fourth and Fourteenth Amendments to the United States Constitution. See Appendix D.

VI. Federal Constitutional Provisions Involved

The applicable provision of the United States Constitution are as follows:

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause,

supported by oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

Fourteenth Amendment

Section 1
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. Statement of the Case

A. Statement of Facts

On December 8, 1986, law officers in Lincoln Parish, Louisiana caught a new and inexperienced City of Ruston Judge on his way out to lunch and got him to sign a warrant for the search of the petitioner's home. The warrant

was issued because petitioner had sold two stereo speakers that had allegedly been stolen in a burglary on September 3, 1985. The sale had occurred in late August or early September 1986, about a year after the alleged burglary.

The affidavit was prepared more than three months after the sale of the speakers by petitioner to a Ruston bar owner, who had gone to his home to pick them up. The bar owner did not tell the officers who prepared the affidavit that he had seen any of the items listed in the affidavit in support of the warrant at petitioner's home. Nor was there any information from any other source indicating that any of the items allegedly stolen in the alleged burglary, some fifteen months before the search, had ever been at petitioner's home.

When the officers arrived at

petitioner's home and informed him that they were there to search because he had sold some speakers that were allegedly taken in a burglary, he pulled from his records a signed receipt for the speakers. The records were in or on petitioner's desk in the foyer where the petitioner and the two or three officers were standing. The officer in charge ignored the receipt and proceeded to search petitioner's residence. Although the officers admitted during their testimony at the motion to suppress that the signed receipt was shown to them before the first search began, they never produced the receipt for trial, even though the return on the second warrant, issued the same day as the search, December 10, 1986, showed that receipts and other records of the petitioner were seized and the petitioner properly

requested the receipt for use as evidence at the trial.

None of the items listed in the original affidavit and warrant were found at petitioner's home during the searches, both under the initial warrant and under a second warrant issued during the course of the search pursuant to the first warrant.

The officers did find the guns that formed the basis for the prosecution that resulted in petitioner's conviction of possession of firearms by a convicted felon.

B. Proceedings Below

The petitioner filed a motion to suppress both physical and testimonial evidence. A hearing was held on this motion in the Third Judicial District Court on May 1, 1987, at which the purchaser of the speakers testified that

he never told the officers that he ever saw any of the items listed in the affidavit in support of the initial warrant at petitioner's home.

The officers testified, as well, with the officer in charge initially stating that he saw alleged contraband in plain view while standing in the foyer of petitioner's home, before beginning the search. He was forced to retract that statement, however, when defense counsel demonstrated that he was not telling the truth.

At this hearing, one of the other officers, Sgt. Hermes, who was present in the foyer of the petitioner's home when he showed the receipt for the speakers, testified that he would have been satisfied and not proceeded further with the matter, but he was not in charge. He was employed by the Ruston,

Louisiana, Police Department, as was the officer in charge, Inspector Kavanaugh.

The court denied the motion to suppress, finding that there was probable cause. The trial judge also demonstrated a lack of understanding of the decisional law of this court by ruling that petitioner's staleness argument was without merit because the officers acted reasonably quickly after getting the information about the sale of the allegedly stolen speakers by petitioner, and by ruling that good faith was demonstrated by the officers in the fact that they did not break down petitioner's door, but waited until he was home to execute the search.

In ruling on the staleness issue the court said, at R. p. 379, the following:

> "The issue of staleness, I think, does not apply because

> the -- it was not the officers who waited the three months. They didn't learn the information until just before they got the warrant."

This demonstrates a profound lack of understanding of the law.

An application for supervisory writs was made to the Second Circuit Court of Appeal, but was denied on June 11, 1987, on the basis that petitioner had an adequate remedy on appeal in the event of conviction.

The matter proceeded to trial on September 25, 1987, and petitioner was convicted and sentenced to pay a fine and to serve six years in prison at hard labor without benefit of probation, parole or suspension of sentence.

On appeal to the Second Circuit Court of Appeal, the court found that there was no probable cause to issue the initial warrant, but sustained the search

under the good faith exception. The court completely ignored the importance of the signed receipt shown to the officers by petitioner to the good faith issue. In fact, inexplicably, the court omitted any mention of the signed receipt, though petitioner's brief prominently discussed the importance of the receipt to any good faith analysis.

In its discussion of the staleness issue, the Second Circuit did not cite the often cited decision of this court controlling the staleness analysis, though the case was also cited and discussed by counsel for petitioner.

Relief was requested in the Louisiana Supreme Court, but no relief was granted, even though that court has not adopted a good faith exception to the warrant requirement.

This petition is filed in an

attempt by petitioner to secure the reversal of his conviction and sentence, all of which came about in violation of his federally protected rights.

VIII. Reasons For Granting Writ

This Honorable Court should grant a Writ of Certiorari to the Honorable Supreme Court of the State of Louisiana to correct a clear violation of the petitioner's federally protected constitutional right to privacy and to due process of law, guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

The affidavit in support of the search warrant was defective in that it contained stale, inadequate information. The court below misunderstood this staleness issue and completely ignored clear evidence that officer Kavanaugh acted in bad faith in proceeding to

search petitioner's residence after receiving evidence that undercut the already inadequate showing of probable cause.

If this court does not act, petitioner will have to spend six years in prison at hard labor without benefit of probation, parole or suspension of sentence.

IX. ARGUMENT

A. In its opinion in this case, the Second Circuit Court of Appeal held that the warrant issued on December 8, 1986 and executed at petitioner's residence on December 10, 1986 was invalid and should not have been issued. State v. Lewis, 535 So.2d 943, 947 (La. 2nd Cir, 1988). The Court did not discuss the second warrant at all. That warrant was based entirely upon observations made inside petitioner's

home while officers were executing the first warrant. Accordingly, that warrant was also invalid.

The Second Circuit completely ignored the fact that, prior to the beginning of any search, the petitioner showed the officers a signed receipt for the two speakers he had sold to Mr. Reeves; this receipt was for $450.00 for the used speakers and strongly indicated that he had paid a fair price for them and had come by them legally. In his brief to the Second Circuit Court of Appeal, petitioner's counsel discussed the receipt and its importance to the issue of good faith under the rule established by this court in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The Leon good faith exception had been adopted by the Second Circuit Court of Appeal in

State v. Wood, 457 So.2d 206 (La. 2nd Cir. 1984), and counsel was aware of Leon and Wood at the time the motion to suppress was written and argued, as is evident from the fact that this issue was addressed at that time.

This court adopted the exclusionary rule in Mapp v. Ohio, 367 U.S. 644, 81 S.Ct. 1684, 6 L.Ed.2d 1981(1961), requiring that evidence seized pursuant to an illegal search be suppressed on motion of the defendant. The decision in Mapp is still the law of the land. But, in Leon, supra, this court recognized some exceptions to the rule, where a warrant has been issued but has been found to be invalid for the reason that there was no probable cause for its issuance.

In order for the Leon exceptions to apply, the officers'

reliance on the warrant must be objectively reasonable, United States v. Leon, 104 S.Ct. at 3421. If the officers' reliance upon the warrant was not reasonable, it follows that the good faith exception should not be applied.

The Court of Appeal for the Fifth Circuit held that the Leon good faith exception should not be applied in a case were a police captain obtained a warrant based on a "bare-bones" affidavit and proceeded to execute it. United States v. Barrington, 806 F.2d 529, 531-532 (5th Cir. 1986). Here, the affidavit was defective and the officers were presented with a signed receipt showing that petitioner had bought the speakers for a fair price. This evidence further undercut the already insufficient evidence of probable cause and Inspector Kavanaugh, who was the veteran police

officer in charge of the search, should have known that the search would violate the petitioner's constitutional rights. Having had the receipt for the speakers shown to him, it was not objectively reasonable for him to believe that probable cause existed to support the search at the time the search was undertaken. Therefore, he did not act in good faith.

The Second Circuit Court of Appeal was clearly wrong in applying the Leon good faith exception to the facts of this case. If not, this court is invited to recogize another exception for this case.

B. A good many years ago, this court decided a case that presented the question of how current affidavit information needed to be to provide probable cause for issuance of a warrant.

The case was Sgro v. United States, 287 U.S. 206, 210-211, 53 S.Ct. 138, 77 L.Ed 260 (1932), and it has usually been cited by courts when the staleness issue has been discussed.

Petitioner urged the Second Circuit to apply the language of Sgro in considering the staleness issue, which was presented in the motion to suppress, and supported and argued at the motion to suppress hearing.

In Sgro this court stated the following at 53 S.Ct. 140.

> ...(I)t is manifest that the proof must be of facts so closely related to the time of the search warrant as to justify a finding of probable cause at the time. (Emphases added).

Therefore, it is clear that the affidavit in support of the search warrant must be based upon current information. And, if at the time the

search is actually conducted, the officer charged with conducting the search has learned additional facts that show that there is no probable cause to conduct the search, he is not acting in good fatih to rely upon the warrant and proceed.

In this case, the alleged burglary is said to have occurred on September 3, 1985. The speakers were sold by petitioner in late August or early September, 1986. And the search was conducted more than three months later, on December 10, 1986. This was more than fifteen months after the alleged burglary. Important also, is the fact that Mr. Reeves, who bought the speakers from petitioner, never saw any of the items listed on the affidavit in support of the first warrant at petitioner's house. The court below so found. State v. Lewis, 535 So.2d at 947.

It is not surprising, then, that none of the items listed in the warrant were found at petitioner's residence.

The trial court misunderstood this issue altogether. In his ruling denying the motion to suppress the trial judges comment, reported above in the statement of facts, makes it very clear that he did not understand the law of this court on the issue of staleness. How long the police had the information is entirely irrelevant. If the information is stale, it would not matter if it were received by the police ten minutes before the warrant was issued.

Surprisingly, the Second Circuit Court of Appeal seemed to follow the same line of thinking as did the district judge. See Lewis at 535 So.2d at 948.

The treatment of the staleness

issue below is completely wrong. It ignores the teaching of Sgro and is inconsistent herewith. The court wouldn't even cite Sgro. By taking this course of action, the court denied petitioner the right to due process of law, secured by the Fourteenth Amendment.

Conclusion

The misapplication by the courts below of the decisional law of this court, and the violation of the petitioner's right to privacy and to due process of law entitle him to relief. Petitioner prays this court to grant his petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana.

Respectfully submitted,

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Certificate

I hereby certify that three copies of the foregoing petition for Writ of Certiorari to the Honorable Supreme Court of the State of Louisiana were served upon Honorable William J. Guste, Jr., Attorney General for the State of Louisiana, at his office address, 7th Fl. 234 Loyola Bldg., New Orleans, LA 70112, and Mr. T. J. Atkins, District Attorney, P. O. Box 777, Ruston, LA 71270, this 30th day of June, 1989.

Benjamin Jones

BENJAMIN JONES

STATE of Louisiana, Appellee,

v.

Tony LEWIS, Appellant.

No. 19918-KA.

Court of Appeal of Louisiana,
Second Circuit.

Sept. 21, 1988.

Writ Denied March 3, 1989.

Jones and Smith by Benjamin Jones, Monroe, for appellant.

William J. Guste, Jr., Atty. Gen., Baton Rouge, T. J. Adkins, Dist. Atty., Dan J. Grady, III, Asst. Dist. Atty. Ruston, for appellee.

Before HALL, C.J., and JASPER E. JONES and FRED W. JONES, JR., JJ.

HALL, Chief Judge.

Defendant, Tony Lewis, was tried and convicted of possession of a firearm by a convicted felon in violation of LSA-R.S. 14:95.1. He was sentenced to six years

APPENDIX A

at hard labor without benefit of parole, probation or suspension of sentence and was find $1,000 plus costs, in default thereof to serve an additional six months in jail. Defendant appeals his conviction and sentence, asserting 10 assignments of error. Finding these assignments meritless, we affirm.

FACTS

On November 6, 1984, pursuant to plea negotiations with the state, Tony Lewis plead guilty to conspiracy to distribute marijuana in violation of LSA-R.S. 14:26 and 40:966 and was sentenced to pay a find of $750 and costs or serve 90 days in jail and to serve one year in prison at hard labor. The prison term was suspended upon payment of the fine and he was placed on two years probation.

On September 3, 1985, the residence of Steven Lee who resided at 2011 W.

Alabama Street in Ruston, Louisiana, was burglarized by an unknown person. Among the items stolen were the following: two Cerwin Vega speakers; one Technics model SA-626 Stereo receiver, the last four digits of the serial number, A107; one Technic cassette tape player, model RMS218, the last four digits of the serial number, 3279; one 13-inch Magnovox color television; one Intellivision computer game; and one Garcia Ambassador model 6500C fishing reel mounted on a Lew's speed stick fishing rod, model G66k.

On September 10, 1986, Jack Reeves, operator of Zack's bar, purchased two Cerwin Vega speakers from defendant for $450.00 at defendant's residence at 1109 McAllister Street in Ruston, Louisiana, where he also saw other stereo equipment. On or about December 5, 1986, Steven Lee

learned that Jack Reeves had two Cerwin Vega speakers at Zack's bar which were the same brand and model as the speakers stolen from him. Lee reported the information to the Ruston City Police Department. He subsequently identified the speakers as his property.

On December 8, 1986, based upon Steven Lee's identification of the speakers, Inspector Kavanaugh of the Ruston City Police Department obtained a search warrant from a city court judge authorizing the search of defendant's residence for the other items taken from Lee's residence on September 3, 1985.

On December 10, 1986, the officers executed the search warrant at Tony Lewis' residence. While executing the warrant officers found in plain view a partially smoked handrolled cigarette, suspected to be marijuana, in an ashtray

on a dresser in the master bedroom. Officers subsequently contacted an investigator of the Lincoln Parish District Attorney's office who obtained a second search warrant to search the premises for financial records, U. S. currency, and other quantities of controlled dangerous substances. During the search officers found guns and related ammunition in defendant's house which included an Intratec 9-mm. pistol found on a closet shelf in the master bedroom under a blue blanket; a Llama .45-caliber automatic pistol fond in a dresser-type cabinet in the den; a Winchester 12-gauge shotgun found in a closet of another bedroom; and over $7,000 in cash found in a coat pocket in a closet.

ASSIGNMENT OF ERROR NO. 1

Defendant contends that the search

warrant was issued without probable cause and that any evidence obtained pursuant to it must be excluded. Defendant also argues that the "good faith exception" to the exclusionary rule under U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) should not be applied.

[1,2] A search or seizure may only be made pursuant to a warrant issued upon probable cause supported by an affidavit of a credible person. U.S. Const.Amend. IV; La. Const.Art. 1, Sec. 5; LSA-C.Cr.P. Art. 162. The function of the judicial officer in determining the existence of probable cause is to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that

contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); State v. Kyles, 513 So.2d 265 (La. 1987).

In this case, after considering the totality of the circumstances, we find that the affidavit was deficient and does not support a substantial basis or sufficient information to establish probable cause.

[3] The affidavit establishes the following facts; the place to be searched; the items to be searched for which were the subject of a burglary fifteen months earlier, described in detail; that the owner of some of the items stolen had positively identified them in the presence of a local police officer after being informed of their presence at a local bar; and the

statement of the bar operator indicating that he purchased the stolen speakers from the defendant at his residence where there was additional stereo equipment located. The affidavit is attached to this opinion as Appendix A.

The affiant does not state in this affidavit that the operator of the bar saw the other stolen items in defendant's home. The fact that defendant had the stolen speakers and other undescribed stereo equipment in his home at the time he sold them 12 months after the burglary and three months prior to execution of the affidavit indicates only the "possibility" of finding other stolen items in defendant's home. The facts provided, without other information linking defendant to the burglary or to other stolen items, does not lead to a practical, common sense conclusion that

there was a "fair probability" that the other stolen items would be found in defendant's home. The warrant should not have been issued and was invalid.

[4,5] While we find that the warrant was invalid, the exclusionary rule should not be applied in this case. The exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in an objectively reasonable good-faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. Suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases where exclusion will further the purposes of the exclusionary rule, that is, the deterrence of illegal

police conduct. U.S. v. Leon, supra; State v. Wood, 457 So.2d 206 (La.App. 2d Cir.1984).

[6] Exclusion is not always inappropriate in cases where an officer has obtained a warrant and abided by its terms. Although a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search, nevertheless, the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant has been properly issued. State v. Wood, supra.

[7] There are four exceptions to the "good faith" exception, or instances

in which suppression remains an appropriate remedy: (1) if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) where the issuing magistrate wholly abandoned is detached and neutral judicial role; (3) where the warrant is "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) where the warrant is so facially deficient, i.e., fails to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonably presume it to be valid. State v. Wood, supra.

Defendant argues that the affiant

clearly misled the judge who issued the warrant by including the statement that "Mr. Reeves stated that there was additional stereo equipment in the residence at the time he purchased these speakers." He argues that Inspector Kavanaugh was aware that the only additional stereo equipment which Mr. Reeves saw was a small home stereo system.

While Mr. Reeves at the suppression hearing testified that he told the officer that he saw a big screen television and "little bitty" small stereo system at defendant's residence, Inspector Kavanaugh's statement was entirely accurate. Defendant did not establish Inspector Kavanaugh's awareness of the actual size of the stereo stolen from Steven Lee's residence or that the officer could not have reasonably

believed the stereo seen by Mr. Reeves was the subject of the burglary. The statement was not misleading to the judge and does not establish bad faith.

[8] Defendant contends that the judge abandoned his neutral and detached judicial role but does not provide any evidence other than to suggest that since the judge signed the warrant he must not have been neutral and detached. In the absence of any evidence to the contrary the judge must be presumed to have read the affidavit and made the probable cause determination, albeit erroneous, based upon the four corners of the document presented to him.

Defendant further argues that the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. His main argument is based

upon the staleness of the information in support of the warrant.

[9,10] Included in the general concept of probable cause is the necessary element of a reasonable belief that the contraband of evidence will not have been disposed of but will remain at the place to be search at the time of the proposed search. State v. Lewis, 385 So.2d 226 (La.1980); State v. Thompson, 354 So.2d 513 (La.1978). Defendant argues that it is unreasonable to believe that the items stolen from Steven Lee in September 1985 would be at defendant's residence fifteen months later in December 1986. We disagree. The items stolen were of a kind defendant might be inclined to keep indefinitely for personal use. Two of the stolen items were at defendant's residence one year after the burglary, and it was no

unreasonable to believe that the other stolen items would be at defendant's residence three month's later. see, State v. Welsh, 371 So.2d 1314 (La. 1979); State v. Brawley, 347 So.2d 238 (La.1977)

In the close call, we have determined that the information contained in the officer's affidavit did not amount to probable cause, but the closeness of the call compels a conclusion that the officer's belief in the existence of probable cause was not entirely unreasonable. The police officers acted on the information soon after it was provided to them in a diligent manner, and the affiant was objectively reasonable in relying on the judge's probable cause determination. Exclusion of evidence discovered through the initial and subsequent warrant is

inappropriate in this case which falls within the Leon rule.

ASSIGNMENT OF ERROR NO. 2

Through this assignment of error defendant argues that he has not been convicted of any crime listed in LSA-R.S. 14:95.1 and the trial court erred in denying his motion to quash. Defendant argues that he was convicted of conspiracy to distribute marijuana which is not a crime covered by LSA-R.S. 14:95.1 because conspiracy is a separate crime. He argues that the statute should be strictly construed and any doubt should be resolved in his favor.

The state argues that conspiracy to distribute marijuana is within the statutory language of "any violation of the uniform control dangerous substances law which is a felony ..." and is therefore a proper predicate offense upon

which to base the prosecution for a violation of LSA-R.S. 14:95.1.

LSA-R.A. 14:95.1 provides in pertinent part:

> A. It is unlawful for any person who has been convicted of ... any violation of the Uniform Controlled Dangerous Substances Law [LSA-R.S. 40: 961 et seq.] which is a felony or any crime defined as an attempt to commit one of the above enumerated offenses under the laws of this state ... to possess a firearm or carry a concealed weapon.

The issue is whether conspiracy to commit a violation of the Uniform Controlled Dangerous Substances Law is a proper predicate offense within the intent of LSA-R.S. 14:95.1.

Any person who attempts or conspires to commit any offense denounced and/or made unlawful by the provisions of the Controlled Dangerous Substance Law shall, upon conviction, be fined or imprisoned in the same manner as for the offense

planned or attempted, but such fine or imprisonment shall not exceed one-half of the punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. LSA-R.S. 40:979.

[11,12] A felony is any crime for which an offender may be sentenced to death or imprisonment at hard labor. LSA-R.S. 14:2(4). Conspiracy to distribute marijuana carries a maximum hard labor prison term of not more than 15 years. LSA-R.S. 40:966, 40:979. The broad language of LSA-R.S. 14:95.1 includes the entire Uniform Controlled Dangerous Substances Act which includes LSA-R.S. 40:979. State v. Carter, 502 So.2d 1136 (La.App. 4th Cir. 1987); State v. Jasper, 491 So.2d 709 (La.App. 4th Cir.1986). Conspiracy to distribute marijuana is a felony, and is a predicate

to the offense of possession of a firearm by a convicted felon. This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 4

Through this assignment defendant contends that there was insufficient evidence upon which to convict him since the state's case is purely circumstantial. He contends that since he was out of town during the days prior to the execution of the search warrant and there is no direct evidence of his actual control over any of the guns the jury had no basis for finding that he was in actual or constructive possession of any of the weapons.

[13] In order to convict defendant of possession of a firearm by a convicted felon the state is required to prove beyond a reasonable doubt (1) possession of a firearm; (2) conviction of any

enumerated felony; (3) absence of the ten year statutory period of limitation; and (4) general intent to commit the offense. State v. Husband, 437 So.2d 269 (La.1983); State v. Miller, 499 So.2d 281 (La.App. 1st Cir.1986).

[14] The constitutional standard of review for the sufficiency of evidence to support a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the state proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Nealy, 450 So.2d 634 (La.1984); State v. Morris, 521 So.2d 1214 (La.App. 2d Cir. 1988). Jackson is the objective standard for testing the overall evidence, direct and circumstantial, for reasonable doubt.

State v. Wright, 445 So.2d 1198 (La. 1984); State v. Sutton, 436 So.2d 471 (La. 1983); State v. Morris, supra. LSA-R.S. 15:438, which as to circumstantial evidence requires exclusion of every reasonable hypothesis of innocence in order to convict, provides an evidentiary guideline, emphasized the need for careful observation of the Jackson Standard, and provides a helpful methodology for its implementation in cases which hinge on the evaluation of circumstantial evidence. State v. Morris, supra; State v. Eason, 460 So.2d 1139 (La.App. 2d Cir.1984), writ denied 463 So.2d 1317 (La1985).

Defendant was not convicted upon purely circumstantial evidence. The state provided direct evidence of conviction of conspiracy to distribute marijuana and absence of the ten-year

statutory period of limitation. The state introduced evidence that when the police officers entered the master bedroom they saw boxes of ammunition on top of the dresser. On the top shelf in the closet, wrapped in a blue blanket, the Intratec 9-mm. pistol with clips was discovered. The 9-mm. pistol was described by police as a semi-automatic assault pistol with a clip holding 30 rounds and a shoulder sling. The Llama .45-caliber pistol was found in the den or living area in a dresser-type cabinet. A "Safari Land" shoulder holster suitable for carrying a large automatic pistol was found in the master bedroom on top of a chifforobe. A 12-gauge Winchester shotgun was seized in the closet of what appeared to be an unoccupied bedroom in the southeast corner of the house. Inspector Kavanaugh stated that when the

guns were found, defendant attributed the ownership of the 9-mm. pistol to his wife, the shotgun to his brother, and after being shown a receipt for the .45-caliber pistol stated that he had bought it.

During rebuttal, the state introduced evidence of the owner's manual for the 9-mm. pistol being found in a dresser drawer in the master bedroom. Inspector Kavanaugh testified that on the evening prior to the search of defendant's home, they had gone by defendant's house on several occasions but no one appeared to be home.

Several defense witnesses testified that the weapons and other related materials were brought to defendant's wife on the evening before the morning of the search so that she would feel more secure. Mrs. Lewis testified that she

had been getting harassing phone calls and since her husband was out of town some friends brought the weapons over for her protection. Lacy Jones testified that he night before the defendant's arrest he brought Mrs. Lewis the Intratec 9-mm. pistol, the owner's manual, and some ammunition. Jones was able to produce a receipt for the purchase of the pistol from a pawn shop with his driver's license number and date of birth on it. John Hassen testified that he brought the shotgun and the .45-caliber pistol to Mrs. Lewis on that same night before the morning of the search. Hassen testified that he brought in the shotgun first and then realized that he had no shells for it so he then brought her the .45-caliber pistol and the ammunition for it. He stated that he purchased the .45-caliber pistol from defendant and produced a

receipt dated August 13, 1984. Hassen further testified that he stayed with Mrs. Lewis until about 2:00 a.m. Mrs. Lewis states that defendant returned home sometime between 2:00 a.m. and 6:45 a.m. from his trip.

[15,16] LSA-R.S. 14:95.1 makes it unlawful for certain convicted felon to possess a firearm. Constructive possession of a firearm, as opposed to actual possession, satisfies the possession element of LSA-R.S. 14:95.1. State v. Day, 410 So.2d 741 (La. 1982). Constructive possession exists when the contraband is subject to the defendant's dominion and control. State v. Pinkney, 485 So.2d 1014 (La.App. 4th Cir.), affirmed as amended 488 So.2d 682 (La.1986).

[17] The state introduced evidence of not one but three firearms located in

defendant's residence. The shotgun was located in what appeared to be an unoccupied bedroom; the 9-mm. assault pistol was found wrapped in a blue blanket on the top shelf in the master bedroom closet; and the .45 caliber pistol was found in the den area in a dresser-type cabinet. These weapons were not readily accessible for Mrs. Lewis' protection as defendant contended. The location and type of weapons found in defendant's residence coupled with the statement by defendant that the 9-mm. pistol belonged to his wife, plus the presence of the shoulder holster in the master bedroom, strongly indicate defendant's awareness, dominion, and control over the firearms. The jury was entitled to and did reject defendant's alibi evidence.

Viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found that the state proved the essential elements of LSA-R.S. 14:95.1 beyond a reasonable doubt. This assignment lacks merit.

ASSIGNMENT OF ERROR 5-10

Through these assignments of error defendant contends that he was denied a fair trial mainly due to rulings by the trial court allowing the introduction of evidence after defendant's objections.

Defendant argues that the trial court erred in allowing the introduction of the following evidence contending that it was either irrelevant, hearsay, or evidence of other crimes which was highly prejudicial: marijuana discovered at the time of the execution of the initial search warrant; the second search warrant and both returns; the money found; and

unauthenticated receipt seized during the search bearing the serial number of the .45-caliber Llama pistol; and other items seized during the search.

Relevant evidence is that tending to show the commission of the offense and the intent, or tending to negate the commission of the offense and the intent. LSA-R.S. 15:441. LSA-R.S. 15:447 provides that any part of the res gestae is always admissible into evidence. LSA-R.S. 15:448 states that in order to constitute res gestae, the circumstances the declarations must be necessary incidents of the criminal act, or immediate concomitants, or form in conjunction with it one continuous transaction.

[18] The articles introduced into evidence were relevant and seized at the time of defendant's arrest for the crime

of possession of a firearm by a convicted felon. The physical and testimonial evidence pertaining to possession of marijuana and a firearm by a convicted felon are concomitant offenses or form one continuous series of events, and thus are a part of the res gestae which is admissible without balancing its probative value against the prejudicial effect. State v. Brown, 428 So.2d 438 (La.1983); State v. O'Neal, 501 So.2d 920 (La.App. 2d Cir.1987), writ denied 505 So.2d 1139 (La.1987); State v. Bailey, 452 So.2d 756 (La.App. 2d Cir.1984), writ denied 456 So.2d 161 (La. 1984).

Defendant also argues that it was improper rebuttal to allow the admission of the Intratec 9-mm. owner's manual in evidence during rebuttal.

[19,20] Generally, in the trial of criminal prosecutions, the state must put

its whole case in evidence in its presentation in chief, and only rebuttal evidence should be reserved to meet the evidence adduced by the defense. State v. Narcisse, 426 So.2d 118 (La.1983), cert.denied 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176, rehearing denied, 464 U.S. 1004, 104 S.Ct. 515, 78 L.Ed.2d 702 (1983). It is within the trial court's discretion to allow rebuttal testimony after defendant's presentation of evidence. State v. Prosper, 455 So.2d 673 (La.App. 4th Cir. 1984).

[21] The trial court did not abuse its discretion since the defense had just presented evidence that the guns were brought to Mrs. Lewis the night prior to defendant's arrest for her personal protection. The state introduced evidence of the location of the owner's manual, inside of a dresser drawer,

tending to show that a person unfamiliar with a gun would not keep the owner's manual in a drawer while the gun itself was located in a closet on a shelf wrapped in a blue blanket. The state's rebuttal was confined to answering defendant's evidence.

Defendant next argues that the trial court erred in allowing Inspector Kavanaugh to testify to certain statements made by defendant during the search. Defendant in his motion for discovery requested the substance of any of his oral statements which the state intended to offer into evidence at trial. The state responded by sending defendant a copy of Inspector Kavanaugh's police report, which included information that Tony Lewis would not admit ownership of any of the firearms located in the residence and that Lewis stated the 9-mm.

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assault weapon belonged to his wife.

During the state's case-in-chief Inspector Kavanaugh testified to the above, and also testified that defendant stated the shotgun belonged to his brother and the .45-caliber Llama pistol belonged to him. After defendant's objection, the trial court instructed the jury to disregard anything other than the statement concerning the 9-mm. weapon and the disclaimer of ownership of any of the weapons. Inspector Kavanaugh was subsequently allowed during rebuttal to testify concerning defendant's statements.

[22] The failure of the state to comply with the discovery procedure will not automatically command reversal. The defendant must show prejudice before the court will reverse his conviction. The court will review the record for a

determination of whether any prejudice which may have resulted from the non-compliance caused the trier of fact to reach the wrong conclusion. State v. Sweeney, 443 So.2d 522 (La.1983); State v. Ray, 423 So.2d 1116 (La.1982); State v. Ancar, 508 So.2d 943 (La.App. 4th Cir.1987).

[23] The most critical evidence against defendant was the presence of the guns located in different locations of his residence. Defendant's statement that the 9-mm. weapon belonged to his wife was directly contradicted by his own witness, Lacy Jones, who stated that the weapon belonged to him, and the state provided defendant with the substance of that statement through the police report. Although the other statements increase the amount of evidence against defendant, we cannot say that any prejudice which

may have resulted caused the trier of fact to reach the wrong conclusion.

These assignments of error lack merit.

ASSIGNMENT OF ERROR NO. 3

Through this assignment of error defendant contends that the sentence of six years at hard labor without benefit of probation, parole or suspension of sentence and to pay a fine of $1,000 and, in default of payment of the fine and costs, to serve an additional six months in jail is excessive in violation of La. Const. Art. 1, Sec. 20 (1974) and LSA-C.Cr.P. Art. 894.1.

[24-26] A sentence violates La. Const. Art. 1, Sec. 20 (1974), if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. State

v. Bonanno. 384 So.2d 355 (La.1980). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it is so disproportionate as to shock the sense of justice. State v. Hogan, 480 So.2d 288 (La.1985). The trial judge has wide discretion in the imposition of a sentence within the statutory limits and such a sentence should not be set aside as excessive absent a manifest abuse of discretion. State v. Square, 433 So.2d 104 (La.1983).

[27] The articulation of the factual basis for a sentence is the goal of LSA-C.Cr.P. Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full

compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982).

[28] The trial court in reviewing the facts noted that a large sum of money was found in a coat pocket hanging in defendant's closet which indicated that defendant was still active in the drug business. The trial court noted that defendant had a prior criminal record which included: in 1978, charged with aggravated battery, grand jury passed; several minor motor vehicle violations; in 1983, charged with distribution of marijuana, pled guilty to conspiracy to distribute marijuana; in 1986, arising out of the same search as the instant offense, charged with possession of marijuana with intent to distribute which was reduced to possession of marijuana, and possession of drug paraphernalia which was dismissed.

The court stated that defendant was a second felony offender and was not eligible for probation or a suspended sentence. The court noted that defendant committed the instant offense while he was still on probation. The court recognized that three firearms were found in defendant's possession and that this was not a situation in which one is in possession of a single firearm used for hunting or to provide a feeling of security by having it around the home. The court stated that even though defendant did not have any type of machine gun or rapid firing gun, he had possession of guns that were capable of firing a number of times. The court noted that the possession of these type of guns does not indicate a peaceable and law abiding purpose and is exactly the type of behavior that the legislature

intended to prohibit by passing a law against the possession of firearms by a convicted felon. Because of defendant's criminal activity and the fact that he had broken his probation, the court felt that it was likely he would commit another crime if he were given a shorter sentence. The court determined that the general nature of his offense indicated that he was in need of a custodial environment and corrective treatment which could best be afforded by commitment to an institution. The court found that any lesser sentence than the one imposed would deprecate the seriousness of the offense charged.

The legislature deemed possession of a firearm by a convicted felon to be a very serious offense which carries a sentencing range from three years at hard labor to a maximum of ten years at hard

labor without benefit of probation, parole, or suspension of sentence, and a fine of not less than $1,000 nor more than $5,000. Defendant's sentence is within the mid-range of imprisonment and the lower range of the fine imposable and does not shock the sense of justice.

This assignment lacks merit.

For the reasons assigned, the conviction and sentence are affirmed.

AFFIRMED.

APPENDIX A

AFFIDAVIT IN APPLICATION FOR SEARCH WARRANT

STATE OF LOUISIANA
PARISH OF LINCOLN

BEFORE ME, the undersigned authority, personally appeared:

Inspector J. D. Kavanaugh

who being first duly sworn, deposed and said.

That he/she/they has/xxxx good

reason to believe and that it is probable that located on/in premises described as follows:

a beige wood-frame two-story structure located in the northeast quadrant of the intersection of McAllister Street and Third Street, Ruston, Lincoln Parish, Louisiana, further described as facing west with a wooden six foot privacy fence surrounding the residence known to be the residence of Tony Lewis there is now located the following property which is evidence of the commission of an offense against the laws of the State of Louisiana:

property stolen in the September 3, 1985, burglary of 2011 W Alabama #36 including a Technics stereo receiver, Model SA626, last four digits of serial number will be A107; a Technics Cassette Deck Model RSM-218, last four digits of serial number

will be 3279; a 13" Magnavox Color Television with plastic woodgrain cabinet; an Intellivision Computer Game; a Lew's Speed Stick fishing rod Model G66K; and a Garcia Ambassador fishing reel, bronze in color Model 6500-C.

That affiant(s) shows that said property is to be so located because:

On September 3, 1985, the Ruston Police Department investigated a burglary at 2011 W. Alabama Ave., Apt. #36, the residence of Steven Lee. Mr. Lee reported that sometime within the last two or three weeks, unknown persons had forcibly entered his apartment and had removed the following items: Two (2) Cerwin Vega Speakers Model D-8; One (1) Technics Model SA-626 Stereo Receiver, sn A107; One (1) Technics Cassette Tape Player Model RSM 218, sn 3279; One (1) 13" Magnavox Color Television; One (1)

In-tellivision Computer Game; and a Carcia Ambassador Model 6500 C fishing reel, mounted on a Lew's Speed Stick fishing rod Model G 66 K. The serial numbers provided by Mr. Lee are the last four numbers of the serial numbers and will be unique to these particular items.

On December 5, 1986, Steven Lee contacted Ruston Police Inspector Jay Kavanaugh and sergeant Tommy Doss, stating that a friend of his told him of two Cerwin Vega speakers located in Zack's Bar on W. California Ave., Ruston, Lincoln Parish, La. Mr. Lee stated that Kevin O'Brian, an employee of Zack's told him that the owner of Zack's, Jack Reeves, had purchased these speakers a few weeks ago from a black male who lived near the airport. Mr. O'Brian was familiar with the speakers stolen from Steven Lee and told Lee that these

speakers were the same brand and model as the speakers stolen from Lee in September 1985. Mr. Lee stated that he wanted to go look at the speakers and wanted a law enforcement officer to accompany him. Mr. Lee that while he did not have a serial number, he should be able to identify the speakers from scratches and other marks that were on his speakers at the time they were stolen. Mr. Lee, specifically, referred to a cigarette burn which was on one of these speakers, being located on the top of the speaker cabinet along the front edge.

Sgt. Doss went with Steven Lee to Zack's Bar where they contacted Mr. Jack Reeves, owner of the establishment. Steven Lee viewed the speakers and, positively, identified the speakers. Jack Reeves states that he purchased the speakers from Tony Lewis who lives at the

corner of McAllister Street and Third Street in a wood-frame house which is located in the northeast quadrant of the intersection. Jack Reeves stated that he and Kevin O'Brian went to the Lewis residence to purchase the speakers on or about September 10, 1986, and Reeves paid Tony Lewis the sum of $450.00 for the speakers. Mr. Reeves recalled that one of the speakers was upstairs and one was downstairs. Jack Reeves states that Tony Lewis stated the speakers had been purchased by a friend in Germany at a discount price and was then shipped back to the United States. Mr. Reeves stated that there was additional stereo equipment in the residence at the time he purchased these speakers.

Affiant Kavanaugh is familiar with Tony Lewis and knows him to reside in a wood-frame two-story residence located at

the corner of McAllister St. and Third St.

The purpose of the Search Warrant which may issue pursuant hereto is to search for, seize and preserve evidence of criminal conduct.

/s/ Inspector J. D. Kavanaugh
Affiant

SWORN TO AND SUBSCRIBED before me this 8 day of December, 1986.

/s/ Robert G. James
JUDGE

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

vs. No. 88-K-2599

TONY LEWIS

IN RE: Lewis, Tony; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 19918-KA: Parish of Lincoln 3rd Judicial District Court Div. "B" Number 30,744

March 3, 1989

Denied.

HTL

JAD

WFM

JLD

JCW

LFC

Supreme Court of Louisiana
March 3, 1989

/s/ Frans J. LaBranche, Jr.
Clerk of Court
For the Court

APPENDIX B

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS. No. 88-K-2599

TONY LEWIS

IN RE: TONY LEWIS is applying for Reconsideration of Writ denied March 3, 1989 to the 2nd Circuit Court of Appeal No. 19918-KA; 3rd Judicial District Court Div. B, No. 30,744, Parish of Lincoln.

April 7, 1989

Reconsideration denied.

LFC

JAD

WFM

JLD

JCW

Supreme Court of Louisiana
April 7, 1989

/s/ John T. Olivier
Deputy Clerk of Court
For the Court

APPENDIX C

STATE OF LOUISIANA*PARISH OF LINCOLN* 3RD JUDICIAL DISTRICT COURT

STATE OF LOUISIANA FILED:_____

VS. NO. 30,744, 30,745, 30,746

TONY LEWIS BY:_____
DY. CLERK

MOTION TO SUPPRESS

NOW INTO COURT comes defendant, TONY LEWIS, and moves this honorable court to suppress all physical and all testimonial evidence of any nature seized by law enforcement officials at his residence or elsewhere as a result of the illegal searches conducted at his residence on or about December 10, 1986, pursuant to two warrants issued on or about December 8, 1986 and December 10, 1986, both of which were executed on December 10, 1986.

Mover shows that the premises searched are located at 1109 McAllister Street, Lincoln Parish, Louisiana.

APPENDIX D

Mover shows that the searches of his home violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution, and LSA-Const. art 1, Sec. 5 for the following reasons:

1. The judge who issued the initial search warrant is a city judge who had no authority to issue warrants to search Lincoln Parish residences in felony cases or otherwise;
2. If the land area where defendant's residence is located has been recently annexed to the City of Ruston, then the annexation did not comply with the requirements of LSA-R.S. 33:171 et seq., and the provisions of Section Five of the Voting Rights Act of 1965;
3. The judge who issued the initial warrant did not have probable cause to believe that the items listed in

the warrant would be found at defendant's premises and, indeed, they were not.

4. The initial warrant is a general warrant;

5. The initial warrant listed only large items of electronic equipment, allegedly stolen in a burglary in 1985, and did not authorize any search of areas too small to house such large items; thus, the initial search exceeded the authority to search granted under the initial warrant;

6. The information provided to the Judge who issued the initial warrant was exceedingly stale and did not include even hearsay statements that the items described in the warrant, or any other contraband, was observed by any informant,

confidential or otherwise, at defendant's premises at any time;

7. The judge who issued the first warrant evidently relied upon false and misleading information and groundless suspicions communciated to him by law enforcement officers and others who sought the warrant, since there is not within the four corners of the affidavit for the warrant any facts which came even close to making out a showing of probable cause;

8. The second warrant was issued based on information secured pursuant to the invalid initial warrant, and upon evidence found in a search of areas of the premises not authorized to be searched pursuant to the initial warrant;

9. There was no probable cuase for issuance of the second warrant on December 10, 1986, since all information gathered in support of the affidavit for said warrant was illegally seized or identified pursuant to an illegal search;

10. Any statement made by defendant during the course of any search of his premises should be suppressed as the fruit of an illegal search and seizure;

11. Any statement made by defendant should be suppressed because it was not knowingly, intelligently and voluntarily given after he was advised of his Miranda rights; and

12. The interest of justice would be served by granting the motion to suppress both warrants, because the police engaged in knowing and

intentional misbehavior in providing false, misleading and stale information to the relatively inexperienced city judge who issued the initial warrant in reliance upon their representations.

WHEREFORE, defendant prays that the physical and testimonial evidence seized as a result of the illegal searches be suppressed and that he be discharghed from his bond forthwith or after proper hearings. Defendant further prays that the hearing on this motion not be set closer than 30 days from the date of filing, because of the unusually great amount of investigation that defense counsel must conduct to be fully prepared

to present the evidence at the hearing.

Respectfully submitted,

JONES AND SMITH LAW OFFICE
141 DeSiard St., Suite 408
Monroe, Louisiana 71201
(318) 322-1126

BY: /s/ Benjamin Jones
BENJAMIN JONES

Supreme Court, U.S.
FILED
NOV 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

DOCKET NO. 89-29

SUPREME COURT OF THE UNITED STATES
OCTOBER, 1989 TERM

TONY LEWIS,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

IN RE:

APPLICATION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
STATE OF LOUISIANA,
SECOND CIRCUIT

RESPONSE BY THE STATE OF LOUISIANA TO THE APPLICATION BY PETITIONER

ATTORNEYS FOR RESPONDENT

T. J. ADKINS, DISTRICT ATTORNEY
R. W. FARRAR, JR., ASST. DISTRICT ATTORNEY
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28 pp

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STATEMENT OF THE CASE

This brief is on behalf of the State of Louisiana in response to the brief filed by Tony Lewis in support of his petition to this court for a writ of certiorari. His request is for this Court to review the order of the Supreme Court of the State of Louisiana in refusing to review the decision of the Court of Appeal, State of Louisiana, Second Circuit. State v. Lewis, 535 So.2d 943 (La. App. 2nd Cir., 1988), certiorari denied, 538 So.2d 600 La. S.Ct., 1989. The Court Appeal affirmed the decision of the District Court, which had refused to suppress the fruits of a search warrant used in connection with the trial of petitioner.

In the District Court, petitioner was tried and convicted of possession of a firearm by a convicted felon in violation of LSA - R. S. 14:95.1. The firearms giving rise to this conviction was seized at the home of petitioner in connection with a search warrant issued by Judge Robert E. James, Judge of the Ruston Municipal Court, Lincoln Parish, Louisiana, on December 8, 1986, based on an affidavit executed on the same date by Inspector Jay Kavanaugh, Ruston Police Department, Ruston, Louisiana. This search warrant was served on petitioner on December 10, 1986, and the search conducted at that time. The firearms were not specified in the warrant.

The facts upon which the search warrant was based were that on September 3,

1985, the residence of Steven Lee, Ruston, Louisiana, was burglarized and two (2) Cerwin Vega stereo speakers were stolen along with other items including a stereo receiver, a cassette deck and a color television. On December 5, 1986, Steven Lee reported to the Ruston Police Department that Jack Reeves, owner of Zack's Bar in Ruston, Louisiana, was in possession of the stolen speakers. An investigation was made in which it was determined that the speakers in Zack's Bar were those stolen from Steven Lee and that these speakers had been purchased by Mr. Reeves from Tony Lewis on September 10, 1986, at the latter's residence. The affidavit set forth that Mr. Reeves, in the course of looking over the speakers, had observed additional

stereo equipment at the Lewis residence. On December 10, 1986, after having found Mr. Lewis at home, the search warrant was executed in the course of which search officers located a shoulder holster, a .45 caliber automatic pistol, a 9 millimeter assault pistol, a 12 gauge shotgun and an owner's manuel for the assault pistol. Other items of contraband were found but these were not a subject of the motion to suppress.

The motion to suppress was timely filed in the lower court by defendant based on the defectiveness of the search warrant. It was urged that the affidavit upon which the search warrant was based did not show proper cause for the issuance of the warrant. This motion to suppress was

denied by the lower court and defendant was convicted of possession of a firearm and sentenced to six years at hard labor without benefit of parole, probation or suspension of sentence. This conviction was subsequently appealed and the judgment of the lower court was affirmed. State v. Lewis, supra.

The Appellate Court did find that the search warrant was defective in that it was issued on the basis of an affidavit which showed only possible cause rather than a reasonable probability of cause. However, the conviction was affirmed on the basis of the good faith of the officer in acting upon the warrant issued by the Magistrate. Petitioner then applied to the Louisiana Supreme Court for a Writ of Certiorari to

review the decision of the Court of Appeal, which application was denied. State v. Lewis, supra.

As respondent appreciates the petitioner's application for review, the two questions involved are (a) the validity of the search warrant issued by Judge James and (b) the good faith of the law enforcement personnel in acting upon this search warrant. These are the two issues which will be pursued by respondent.

SUMMARY OF ARGUMENT

A. A legal search may result in the seizure of items not listed in the search warrant if it is immediately apparent to the officer that the items observed may be evidence of crime, contraband, or otherwise subject to seizure.

B. The search warrant issued by Judge James was valid by reason that the affidavit upon which it was based was facially sufficient so as to show a fair probability that contraband and/or evidence of a crime would be found at the premises of the defendant in that,

(1) The contention that the information upon which the affidavit and the resulting

search warrant was based did not set forth sufficient cause is without merit.

(2) The contention that the information contained in the affidavit, upon which the search warrant was based, was stale is equally without merit.

C. The search warrant issued by Judge James, even though invalid, was facially sufficient for the action by the Ruston Police Department in that,

(1) The officer making the seizure of the contraband was reasonable in acting on the warrant;

(2) The good faith of the officer was not obviated by the alleged receipt shown him by the defendant.

ARGUMENT

A. Preface

The Court's attention is directed to the fact that this is a State Court proceeding in which the Federal Court has been requested to intervene in the matter of a Motion to Suppress. This is despite the fact that this Motion to Suppress was considered in an evidentiary hearing in the lower court, was considered by a Court of Appeal, and certiorari was denied by the Louisiana Supreme Court. On this basis, it would appear that a further review by this Court would be unnecessary and unjustified. This is in line with the sentiment expressed in Stone v. Powell, 428 U. S.

433, 49 L.Ed. 2d 1046, 96 S.Ct. 3037 (1976). It is recognized that the Powell case was a habeas corpus proceeding. Yet, it would appear that the same reasoning is applicable.

In considering this search warrant, and the fruits thereof, the Court is reminded that the fruits of a lawful search warrant extends to matters other than those named therein. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). This case is amplified by Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed 2d 502 (1983), which states that items inadvertently found in a legal search may be seized if it is apparent to the officers that these items may be evi-

dence of crime, contraband, or otherwise subject to seizure.

B. Validity of Search Warrant

It is of course the position of respondent that this search was lawful because it was based on a valid search warrant. The search warrant was issued by Judge Robert G. James, whose qualification to issue this warrant is not questioned in applicant's petition. It was based on an affidavit executed by a law enforcement officer, which affidavit particularized the basis for the request. All necessary formalities were observed in the issuance and execution of this search warrant.

(1) Probable Cause:

Petitioner urges that the Louisiana Appellate Court was correct in finding the

warrant to be invalid by reason of the fact that the affidavit upon which it was issued demonstrated a mere possibility that stolen property would be found. The affidavit states that the affiant has reason to believe that certain listed property, which had been the subject of a burglary, was located in the described residence. The affidavit stated further that the burglary included the theft of two speakers sold by defendant-petitioner to a third party. Finally, it sets forth that the purchaser of the speakers advised the investigating officer that, at the time he looked at the speakers in the home of petitioner, he observed additional stereo equipment located there.

At this point, it seems proper to point out that the requirement for a search

warrant is not that the evidence upon which it is based shows beyond a reasonable doubt that contraband will be found. Nor can it be said that this must be shown by a preponderance of the evidence. The requirement is simply that the information upon which the warrant is based demonstrates a fair probability that the items listed therein will be found by the authorized searcher. Illinois v. Gates, 462 U. S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), and United States v. Travisano, 724 F.2d 341 (2nd Cir., 1982). Certainly, this was shown.

It will be noted that the State Appellate Court in affirming the factual findings of the District Court states the affidavit establishes the place to be searched; the items to be searched for

described in detail; that these items had been the subject of a burglary; that the owner of these items positively identified two of the items as having been taken from his home in the burglary; that the possessor of the two items had purchased them from the defendant after viewing them in defendant's home; and that the purchaser from the defendant definitely stated he saw other stereo equipment on these premises.

Yet it states, in an admitted "close call", that it does not consider the facts provided to lead to a practical common sense conclusion that there was a "fair probability" that the other stolen items would be found in defendant's home. This finding appears to be contrary to the generally accepted rule which now prevails.

Considering that the equipment listed in the search warrant was not articles which would likely be moved unless disposed of by defendant, that a market for these type of articles was not readily available, that two of the items in the burglary were in defendant's home three months before the search warrant was issued, and that the information upon which the search warrant was based stated that there was other stereo equipment on the premises, there certainly appears to be a totality of circumstances so as to make the affidavit upon which the warrant was based more than adequate.

2. Staleness of Information:

The State Appellate Court was not specific as to the ground for finding that the

information upon which the warrant was issued presented only a possibility that contraband would be found. Petitioner-defendant urges that it was "staleness of the information".

The petitioner does not seem to question the fact that the search warrant was obtained and executed within a reasonable period after the information had been obtained by the Ruston Police Department. His contention is that the information upon which the warrant was based was stale prior to the time that it came to the attention of the authority. He appears to argue that, simply by reason of the fact the speakers were taken in a burglary approximately one year and three months prior to the issuance of the search warrant, there

was not a reasonable cause for the issuance of a warrant.

He cites Sgro v. United States, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932). This decision has not been applied by this Court in many instances. However, it has been considered by the lower courts on numerous occasions and its holding has been limited. For instance, in United States v. Rahn, 511 F.2d 290 (10th Cir., 1975) a search was upheld based on information concerning observations by the informant two years previous to the issuance of the warrant. In determining that the information provided in support of the search warrant was timely, the Court conceded that "time was a crucial element of probable cause". Appropriately, it

cautions "However, probable cause is not determined by merely counting the number of days between the time of the facts relied upon and warrants issuance." This case cites U. S. v. Johnson 461 F.2d 285 (10th Cir., 1972) which states:

> "Bearing in mind both the element of time and the nature of the facts relied upon in the affidavit, the question of probable cause in the case at bar becomes a question of whether or not the Commissioner could have reasonably presumed the likelihood of a continuing violation. The facts supporting such a presumption were more than ample. The Commissioner should have considered all of the elements of probable cause, including the nature of the criminal activity, the length of the activity, and the nature of the property to be seized; probable cause, in turn, should have been contemplated in view of the practical considerations of everyday life."

A similar holding is U. S. v. Batchelder, 824 F.2d 563 (7th Cir., 1987) states:

> "It is the magistrate's duty to make a 'practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.' United States v. Malsom, 779 F.2d 1228, 1237 (7th Cir., 1985) (quoting Illinois v. Gates, 462 U. S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983)). The age of the information supporting the application for a warrant is a factor that a magistrate should consider. It is, however, only one factor. If other facts indicate that the information is reliable and that the object of the search will still be on the premises, then the magistrate should not hesitate to issue a warrant."

Based on the foregoing, the key appears to be "did Judge James have reaso-

nable cause to believe that the object of the search would still be on the premises?" It is urged that the answer is in the positive.

C. Good Faith of the Parties

It will be noted that the State Appellate Court, in finding the search warrant to be invalid, stated that it was a close call. However, it expressed no reservation as to its finding that the search was a valid search. In so holding the Second Circuit Court of Appeal, State of Louisiana, stated as follows:

> "In a close call, we have determined that the information contained in the officer's affidavit did not amount to probable cause, but the closeness of the call compels a conclusion that the officer's belief in the existence of probable cause was not entirely

> unreasonable. The police officers acted on the information soon after it was provided to them in a diligent manner, and the affiant was objectively reasonable in relying on the judge's probable cause determination. Exclusion of evidence discovered through the initial and subsequent warrant is inappropriate in this case which falls within the Leon rule." State v. Lewis, supra.

This finding is, of course, dictated by U. S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984). The State Court correctly summed up the rule enunciated in that case in stating:

> "Exclusion is not always inappropriate in cases where an officer has obtained a warrant and abided by its terms. Although a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good

faith in conducting the search, nevertheless, the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant has been properly issued. State v. Wood, supra."

There are four exceptions to the 'good faith' exception, or instances in which suppression remains an appropriate remedy: (1) if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) where the issuing magistrate wholly abandoned his detached and neutral judicial role; (3) where the warrant is 'based on an affidavit so lacking in indicia of probable cause as to render official belief in its

> existence entirely unreasonable'; and (4) where the warrant is so facially deficient, i.e., fails to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonably presume it to be valid. State v. Wood, supra."

As to reasons numbered 2 and 4, petitioner appears to have abandoned these even though he had made some argument in the State Court as to the issuing magistrate having abandoned his neutral judicial role. This is indeed understandable in view of the fact the record contained not a scintilla of evidence to support the bad faith of Judge James. Also there is no question but that the warrant particularizes the place to be searched and the items to be seized.

In judging this good faith issue, we are left with the questions (a) was the warrant so lacking of probable cause so as to render it unreasonable for the searcher to believe in its validity; and (b) was the affidavit on which the search warrant was based known to be false by the searcher or would have been known to be false except for his reckless disregard.

1. The searcher was reasonable in relying on the search warrant

Seemingly, in attempting to have this exception to the Leon rule applied, petitioner raises the question of staleness. This has, of course, been discussed previously in regard to the validity of the search warrant. However, it is also the position of respondent that staleness is

not an issue in this phase. Respondent finds no case in which the bad faith of the searcher is found because the warrant contained facts demonstrating the staleness of the information upon which it was based. This is not within the province of the officer. This is within the judicial discretion of the issuer of the warrant. In this instance the full facts were presented to the issuing magistrate. Based on these facts, he concluded that the information upon which it was based was sufficient. Accordingly, it would appear most arbitrary to find Inspector Kavanaugh in bad faith because he failed to refuse to execute a warrant on the basis that Judge James committed judicial error. This appears to be the basis of the

rulings in a number of cases finding there was good faith including United States v. Thomas, 757 F.2d 1359 (2nd Cir., 1984), where the issue was staleness of the information. Also, see United States v. Gant, 759 F.2d 484 (5th Cir., 1985).

2. Did the purported receipt negate the searcher's good faith?

The lower court had no difficulty in finding that Inspector Kavanaugh was in good faith in relying on the magistrate's probable cause determination and that the technical sufficiency of the warrant issued was objectively reasonable. It would appear that its finding was imminently correct and in line with the authorities following U. S. v. Leon, supra.

In an effort to come within Exception 1, the petitioner has utilized the fact that defendant presented to Inspector Kavanaugh a receipt allegedly showing that he had purchased the speakers from another party. He contends that this made the information in the affidavit false and this false information was known to the searcher, Inspector Kavanaugh. The evidence clearly established that the purported receipt contained no information directly relating it to the speakers. In addition, the signature on the receipt was illegible making it most suspect and affording the investigating officer no reasonable grounds to believe that it established the speakers had been purchased by the defendant.

The applicant cites no cases in support of his position and respondent finds no cases in point to support its position. However, as the question on good faith is that of reasonableness, such would seem to apply in this instance. LaFave, Search and Seizure, 2d Ed., Vol.1, P. 76-77 suggests that the test should be "whether a reasonably well trained officer would have known that the basis of the affidavit upon which the search warrant was based was illegal and his request for the warrant was outside the range of professional competence expected of an officer." It is to kept in mind that the investigation necessary for the application of a search warrant is not an adversary proceeding and the applicant is not

required, nor qualified, to conduct a judicial proceeding in the process of executing a warrant. He is simply required to act reasonable.

The purported "receipt" displayed by defendant was described by the officers as a scrap of paper with the single word "speakers" and an illegible signature upon it. There was nothing else. The "document" fails to show that it has reference to the particular speakers in question, fails to show whether it has reference to Lewis' acquisition of the speakers or his sale thereof to Reeves, and fails to show consideration or anything else which would aid the police in determining whether Lewis possessed these speakers legally or illegally.

Certainly, Inspector Kavanaugh was not unreasonable in refusing to accept this receipt as such proof so as to place him in bad faith in proceeding to execute the search warrant.

CONCLUSION

The only question involved in this application for a writ of certiorari is "were the fruits of a search warrant issued herein tainted by reason of the search warrant having been improperly granted or executed."

This Court in U. S. v. Ventresca, 380 U. S. 102, 85 S.Ct. 741 (1965) stated:

> "However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate

> the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." (Underscoring ours.)

Such seems to be applicable to this case. It is submitted that the warrant, and the affidavit upon which it was based, was sufficient in every respect. The State Appellate Court was in error in finding that the affidavit stated only a possibility rather than the required fair probability. In considering Mapp v. Ohio, 367 U. S. 643, 81 S.Ct. 1684, 62 L.Ed. 2d 1981 (1961), and U. S. v. Leon, 468 U. S.,

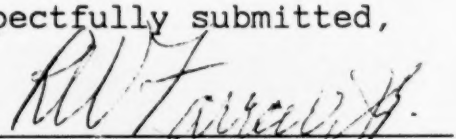
897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984), the courts have spoken often of the "totality of the circumstances" in finding that the search warrant was valid. Certainly, in this instance, this requirement was properly met.

However, assuming that the warrant was invalid, this did not void the search. As found by the State Appellate Court, the execution of the warrant was proper by reason of the good faith exception set forth in the Leon case. The petitioner's efforts to demonstrate bad faith does not in any way question the competence or integrity, either personal or professionally, of either the law enforcement personnel or the signing magistrate. Instead, he attempts to impugn bad faith

on the basis of reliance on stale information and a failure to accept a purported receipt furnished by the defendant. There is considerable question as to whether or not either of these should be considered in connection with the matter of good faith. If the Court should so hold, respondent deems its presentation to have clearly resolved these questions in favor of the State.

Accordingly, it is respectfully submitted that the Motion to Suppress was properly denied in the Trial Court and this action properly affirmed in the State Appellate Court. Therefore, the petition for certiorari submitted by defendant should be denied.

Respectfully submitted,

By: 

R. W. Farrar, Jr., Esq.
LEAD COUNSEL

CERTIFICATE

I hereby certify that a copy of the foregoing Response to Petition for Writ of Certiorari has been served upon the applicant, Tony Lewis, by mailing three (3) copies of same to his attorney of record in the manner provided by Rule 33, Rules of the U. S. Supreme Court, addressed as follows:

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Ruston, Louisiana; October 30th, 1989.

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